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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1076

PROCTER & GAMBLE INDEPENDENT UNION OF PORT IVORY, N. Y.,

Petitioner,

v.

THE PROCTER & GAMBLE MANUFACTURING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Citations to Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	2
Statement of the Case	2
Argument	4
I. There Is No Enforceable Contract Right to Compel Arbitration Under Section 301 of the Labor Management Relations Act Where the Activities Giving Rise to the Asserted Grievances Arose After the Collective Bargaining Agreement Had Expired	4
II. There Is No Contract Between an Employer and a Labor Organization, Enforceable Under Section 301 of the Labor Management Relations Act, Arising by Virtue of the Asserted Violations of the Obligation to Bargain Provided by Section 8 of the National Labor Relations Act	6
Conclusion	9

TABLE OF CASES

Atkinson v. Sinclair Refining Co., 370 U. S. 238	5, 7
Dowd Box Co. v. Courtney, 368 U. S. 502	7, 8
International Union of Opr. Engr. v. Dahlem Const. Co., 193 F. 2d 410 (6th Cir. 1951)	8
Local 3 v. NLRB, 210 F. 2d 325 (8th Cir. 1954) cert. denied 348 U. S. 822	8
Local 219, Retail Clerks Int'l Ass'n v. NLRB, 265 F. 2d 814 (D. C. Cir. 1959)	8
San Diego Building Trades Council v. Garmon, 359 U. S. 236	7

PAGE

Smith v. Evening News Assn., 371 U. S. 195 7

Teamsters Local v. Lucas Flour Co., 369 U. S. 95 .. 7, 8

United Steelworkers v. Warrior & Gulf Nav. Co., 363 U. S. 574 ..... 5, 9

Zdanok v. Glidden Co., 288 F. 2d 99 (2nd Cir. 1961) aff'd on other grounds, 370 U. S. 530 5

STATUTES

61 Stat. 140, Title 29 U. S. C. § 158 ..... 2, 3, 4, 6, 7, 8

61 Stat. 156, Title 29 U. S. C. § 185 ..... 2, 3, 4, 6, 7, 8

62 Stat. 928, Title 28 U. S. C. § 1254(1) 1

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OPINIONS BELOW

The opinion of the District Court (Petition p. 33) is reported at 202 F. Supp. 518. The opinion of the Court of Appeals for the Second Circuit (Petition p. 37) is reported at 312 F. 2d 181.

JURISDICTION

The judgment of the Court of Appeals was entered on December 10, 1962 (Petition p. 67). The statutory provision conferring jurisdiction on this Court is found at 62 Stat. 928; Title 28, U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Is there an obligation to arbitrate, enforceable under Section 301 of Labor Management Relations Act, where the acts giving rise to the asserted grievances arose after the collective bargaining agreement had expired?
2. Is there a contract established, enforceable under Section 301 of Labor Management Relations Act, where one party or the other to an expired collective bargaining agreement has assertedly failed to comply with the defined duty to bargain collectively under Section 8(d) of the National Labor Relations Act?

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (29 U. S. C. § 158) are set forth in the Petition at pages 64-65, and the Labor Management Relations Act (29 U. S. C. § 185) are set forth in the Petition at page 65.

STATEMENT OF THE CASE

Petitioner, Procter & Gamble Independent Union of Port Ivory, N. Y. (herein called the Union) filed this action in the United States District Court for the Eastern District of New York under the provisions of Section 301(a) of the Labor Management Relations Act seeking an order directing the Respondent, The Procter & Gamble Manufacturing Company (herein called the Company) to arbitrate two grievances pursuant to the terms of the collective bargaining Agreement of April 30, 1959.

In accordance with its terms, the Union had given notice of its wish to negotiate a new agreement more than 60 days prior to the expiration date of the contract. During the negotiations for a new agreement, the Company and Union mutually agreed to extend the April 30, 1959 Agreement for a two week period ending May 14, 1960. The parties were unable, however, to reach agreement on terms

for a new contract. A subsequent offer by the Company to further extend the contract was flatly rejected by the Union on May 13, 1960. On that date the Union unilaterally sent notice to the federal and state mediation services pursuant to Section 8(d)(3) of the National Labor Relations Act, which notice the Union now claims was untimely.

Thereafter events took place which brought about the grievances involved here. The disputes concerned overtime assignments to two employes and the resulting warning by the Company to them and others. Grievances were filed May 21st and June 7th. The Union and the Company did not enter into a new collective bargaining Agreement until June 23, 1960.

The Union requested arbitration of both the grievances. The Company refused to arbitrate each grievance on the grounds (1) that no contractual obligation to arbitrate existed, and (2) that the grievances had been disposed of by the parties as part of the consideration for executing the Agreement on June 23, 1960.

The Union filed suit under Section 301 of the Labor Management Relations Act seeking an order to compel the Company to arbitrate these grievances. The District Court granted a motion for summary judgment, holding that the agreement of April 30, 1959 expired on May 14, 1960; that the Union's untimely notice under Section 8(d)(3) did not extend the termination date of the 1959 contract; but that the arbitration obligation continued on after termination of the Agreement as part of the employee-employer relationship.

The Company appealed to the United States Court of Appeals for the Second Circuit which reversed the District Court's judgment and granted summary judgment for the Company. The Court held that the arbitration obligation existed between the Company and the Union, by reason of contract only, and therefore ceased to exist upon the termination of the contract; that the April 30, 1959 Agree-

ment terminated by mutual agreement on May 14, 1960; that the Agreement did not continue in effect by reason of the action of the parties; that the Union's failure to give timely notice pursuant to Section 8(d)(3) of the Act did not affect the termination of the Agreement; and that no contractual arbitration obligation enforceable under Section 301 of the Labor Management Relations Act arises merely from the duty to bargain provisions of the National Labor Relations Act.

ARGUMENT

I

There Is No Enforceable Contract Right to Compel Arbitration Under Section 301 of the Labor Management Relations Act Where the Activities Giving Rise to the Asserted Grievances Arose After the Collective Bargaining Agreement Had Expired.

The Petition fails to raise any question meriting review by this Court. The strained arguments made by the Union in its questions 1 through 4 (Petition pp. 2-3) based upon its own alleged failure to give notice to the mediation services under Section 8(d) of the National Labor Relations Act, rejected both by the District Court and the Court of Appeals, are treated in point II below.

The Union's primary contention, contained in its question 5 (Petition pp. 3-4), is that the arbitration provisions of a collective bargaining agreement survive even the parties' mutual termination of such agreement. It is urged by the Union, and accepted by the District Court but rejected by the Court of Appeals, that the terms and conditions of employment, including arbitration, continue as a matter of law as part of the employer-employee relationship and give rise to a contractual obligation enforceable under Section 301 (Petition pp. 20-32).

This novel contention, unsupported by any Supreme Court, federal Court of Appeals or other District Court

decision, does not merit review by this Court for the reason that as recently as in *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, this Court clearly held that:

> ". . . arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." Id. at 580.[1]

There is no doubt that after May 14, 1960 the contract involved herein was terminated. The Agreement of April 1959 terminated by its own provisions on April 30, 1960 and was extended by mutual agreement of the parties to May 14, 1960. On May 13, 1960 the Union unconditionally refused the Company's offer to extend the contract, and by its own act thereby sealed the termination of the Agreement of April 1959.

To hold that the Company has agreed to submit to the arbitration procedures of the expired contract a dispute arising after its termination date would be a legal fiction in which the words "contract" and "agree" used in the *Warrior* case would have no relationship to their dictionary or traditional legal definitions.

The Union's reliance on *Zdanok* v. *Glidden Co.*, 288 F. 2d 99 (2d Cir. 1961), affirmed on other grounds, 370 U. S. 530, is misplaced. The Court of Appeals in the present case (which is the same Court that decided *Glidden*) concluded that the result of the *Glidden* case was dictated by a construction of the language of the seniority provisions of that contract, and its principle had no application to the factual situation in this action. Then the court below further stated:

> "More particularly the case [Glidden] cannot be made to stand in any general way for the survival of contractual obligations during any period beyond the period for which they were expressly undertaken." 312 F. 2d at 186.

[1] And see the reiteration and reaffirmation of this holding in *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 239, 241.

The Union has pointed to no language in the arbitration provision involved herein which demonstrates an agreement between the parties to extend such provision's coverage beyond the termination of the contract.

Nor can it be said, as the Union claims, that the performance of work by employees carries the right to arbitrate disputes arising after the termination of the collective bargaining agreement, in that the Union was merely the trustee of that right. This argument is patently false and there is no authority to support it, as the Union in effect concedes. Apart from the fact that it was only the Union that could pursue arbitration under the expired contract, as the Court of Appeals correctly held, a contention that the right to arbitrate rests with the employees adds no substance to the Union's claim. Whoever may have been entitled to take a dispute to arbitration under the expired Agreement, the Company's obligation to arbitrate was a creation of the contract and, therefore, ceased to be binding upon the termination of the contract.

II

There Is No Contract Between An Employer and a Labor Organization, Enforceable Under Section 301 of the Labor Management Relations Act, Arising By Virtue of the Asserted Violations of the Obligation To Bargain Provided By Section 8 of the National Labor Relations Act.

As indicated above, the Union has sought to raise a number of questions (Petition pp. 2-3) based upon arguments, rejected by the Court of Appeals as well as the District Court, that assumed failures to comply with statutory bargaining requirements of Section 8 of the National Labor Relations Act establish a contract between the Company and Union enforceable under Section 301 of the Labor Management Relations Act. These assumed failures raise questions of possible unfair labor practices only, which are within the exclusive jurisdiction of the National Labor

Relations Board. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236.

The Union's contention[2] that a federal district court is not ousted of jurisdiction under Section 301 because a breach of contract may also involve an unfair labor practice is correct. The Union's argument, however, is that the Company's alleged breach of contract consisted of its alleged commission of unfair labor practices. The cases cited by the Union are premised on the fact that there has been a breach of a currently existing contractual commitment, but the record in the present case negates this necessary factual postulate.

The fatal defect in the Union's contention here is the complete absence of a contract between the parties. On May 13, 1960 the Union rejected the Company's offer to extend the contract. On May 14th the contract came to an end. In an effort to bridge this unassailable chasm, the Union has contrived a number of arguments referred to by the Court of Appeals as the "National Labor Relations Act contentions" (Petition pp. 46-52).

The Union argues that its own failure to give timely notice to the mediation services pursuant to Section 8(d)(3) of the National Labor Relations Act established a contractual obligation binding the Company to maintain "in full force and effect . . . all the terms and conditions" of the expired contract under Section 8(d)(4) of the Act. If the Union did violate Section 8(d) and 8(b)(3), and if, indeed, by some process of statutory interpretation, the Union's violation resulted in a violation by the Company of Section 8(d)(4), as the Union appears to contend, the plain answer is that these presumed violations would be issues subject to the exclusive determination by the National Labor Relations Board in an unfair labor practice proceeding. There is no legislative history or judicial

[2] *Smith* v. *Evening News Ass'n*, 371 U. S. 195; *Dowd Box Co* v. *Courtney*, 368 U. S. 502; *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238; *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95.

precedent for the carrying over of the public law which prohibits unfair labor practices into private party suits under Section 301 for breach of contract.

The Court of Appeals quoted extensively from the case of *International Union of Opr. Engr.* v. *Dahlem Construction Co.*, 193 F. 2d 470, 473-4 (6th Cir. 1951), which was cited with approval by this Court in the *Lucas Flour* case, *supra*, and held correctly that a failure to comply with Section 8(d) of the National Labor Relations Act does not establish a contractual breach (Petition pp. 49-50).

Thus, a construction of Section 8(d) is not necessary, nor is it material, to resolve the contractual issues presented here under Section 301, which as Congress and this Court have instructed should be left to the usual processes of contract law. See *Dowd Box Co., supra.* It therefore follows that asserted conflicts in the construction of Section 8(d) should not be collaterally reviewed in a contract action in which that section is, in law, irrelevant.[3]

Finally, the Union contends the Company committed an unfair labor practice because it refused to maintain the arbitration provision after the contract terminated but before an impasse in bargaining was reached (Petition pp. 3, 7-8, 23-32). This contention is not tied to the asserted failure to give notice under Section 8(d)(3), but is based upon a refusal to bargain because of the "unilateral action" taken by the Company. This argument has the same fatal defect as the Union's argument based on Section 8(d). Here again, reliance upon an assumed violation of Section 8 of the National Labor Relations Act does not establish a contract enforceable under Section 301 of the Labor Management Relations Act. The sole jurisdiction over such

[3] The Union's assertion of a conflict (Petition pp. 6, 12-17, 53-62), between the Court of Appeals holding here and the District of Columbia and Eighth Circuits is misplaced. In *Local 219, Retail Clerks Int'l Ass'n* v. *NLRB*, 265 F. 2d 814 (D. C. Cir. 1959) and *Local 3* v. *NLRB*, 210 F. 2d 325 (8th Cir. 1954), cert. denied 348 U. S. 822, unfair labor practices only were considered, and no question of contract rights was present. Even so, the imagined conflict does not in fact exist.

asserted unfair labor practice is lodged with the National Labor Relations Board.

CONCLUSION

Following the refusal of the Union to extend the contract beyond the termination date mutually agreed upon, the Union has sought to construct a "contract" by operation of law in an effort to support enforcement of arbitration of asserted grievances upon acts arising subsequent to the contract's termination. No such "contract" can be constructed by reference to asserted unfair labor practices which are within the exclusive jurisdiction of the National Labor Relations Board or out of the general employer—employee relationship. The Union's contentions to the contrary are flatly contradicted by this Court's recent holding in the *Warrior* case that arbitration is "matter of contract."

Hence, no important question of federal law needing determination by this Court has been presented. No relevant conflict in decisions between Courts of Appeals has been presented. Nor has any other reason of the character set forth by this Court in its Rule 19 ~~had~~ been asserted.

For these reasons the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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